

163FGUCA

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 GUCCI AMERICA, INC. et al,

4 Plaintiffs,

5 v.

10 CV 4974 (RJS)

6 WEIXING LI, et al,

7 Defendants.

8 -----x
9 New York, N.Y.
June 3, 2011
2:30 p.m.

10 Before:

11 HON. RICHARD J. SULLIVAN,

12 District Judge

13 APPEARANCES

14 GIBSON DUNN

15 Attorneys for Plaintiffs

16 NETRA SREEPRAKASH

ROBERT WEIGEL

17 ALLEN & OVERY

Attorneys for Bank of China

18 ANDREW REYNARD

19 LANIER SAPERSTEIN

163FGUCA

1 (Case called)

2 (In open court)

3 THE COURT: This is Gucci America v. Weixing Li,
4 docket number 10 CV 4975. Appearances, please?

5 MR. WEIGEL: Robert Weigel and Naptha Sreeprakash from
6 Gibson Dunn & Crutcher for plaintiffs.

7 THE COURT: Mr. Weigel and Ms. Sreeprakash? I don't
8 see you on the docket sheet, but maybe I missed it.

9 MS. SREEPRAKASH: I haven't submitted a notice of
10 appearance in this particular action.

11 THE COURT: Let's do that so we have everybody who is
12 working on this case on the docket.

13 MS. SREEPRAKASH: I will do that.

14 MR. SAPERSTEIN: Lanier Saperstein of Allen & Overy
15 for Bank of China today. I'm joined here today by my colleague
16 Andrew Reynard who, too, will submit a notice of appearance.

17 THE COURT: Mr. Saperstein and Mr. Reynard. Good
18 afternoon. I guess a lot of things are going on and have been
19 going on. This is a case in which I previously issued a
20 preliminary injunction which was extended to third parties,
21 including Bank of China, and without going through all the
22 details, a motion was made by plaintiff to compel Bank of China
23 to produce confirmation and proof of the freezing of the
24 defendant's assets and accounts consistent with the injunction,
25 and then I got Bank of China's cross motion to modify the

163FGUCA

1 preliminary injunction. That was all when White & Case was
2 managing the case for Bank of China, right?

3 MR. SAPERSTEIN: Yes, your Honor.

4 THE COURT: And then in the interim an amended
5 complaint was filed naming additional defendants and an issue
6 arose with respect to service, alternate service on those new
7 defendants and, among other things, plaintiffs are seeking to
8 have service effectuated through personal service on Bank of
9 China's counsel and Bank of China's New York branch, though
10 also publication in a Beijing newspaper and service upon the
11 prior defendants with the direction that they forward the
12 complaint and summons to the new defendants.

13 Let's start, I think, with the injunction. I've
14 gotten some letters and things from the parties since. This is
15 the first time I've seen you, Mr. Saperstein?

16 MR. SAPERSTEIN: Yes.

17 THE COURT: You're still moving to modify the
18 preliminary injunction?

19 MR. SAPERSTEIN: Yes.

20 THE COURT: Mr. Weigel, you're still moving to get
21 them to show what they've done to comply with the injunction?

22 MR. WEIGEL: Yes, your Honor.

23 THE COURT: Seems we moved a little bit, but go ahead.

24 MR. WEIGEL: We also asked that they be required to
25 produce the documents that were sought.

163FGUCA

1 THE COURT: Under the injunction?

2 MR. WEIGEL: And also pursuant to the subpoena we
3 served on them.

4 THE COURT: The parties have sent me as recently as a
5 short time ago authority from New York State and others that
6 relate to the separate entity doctrine. Do you want to talk
7 about that, first?

8 MR. WEIGEL: Certainly. Or if you'd like to talk
9 about the service we might be able to reach some sort of
10 agreement on that.

11 THE COURT: Well, wait. We might be able to reach an
12 agreement on what?

13 MR. WEIGEL: Well, what we've figured out, your Honor,
14 is that unlike in most of these cases where when we shut down
15 the website there's no longer an active e-mail address because
16 the e-mail address was sort of part of the website, the
17 administrator for these websites, according to Network
18 Solutions, which was the host, the contacts are two Yahoo
19 addresses. So those e-mail addresses are live e-mail
20 addresses. We've served things on them. They've not bounced
21 back.

22 So I've spoken to Mr. Saperstein, and they, leaving
23 aside the question whether they remain standing, they certainly
24 don't care how we serve these folks.

25 THE COURT: As long as it's not through them.

163FGUCA

1 MR. WEIGEL: As long as it's not through them. So if
2 your Honor found it acceptable, and I think it would be --

3 THE COURT: So this is a new alternate service?

4 MR. WEIGEL: It was part of serving the other
5 defendants. What we didn't realize when we did that, we both
6 physically served the other defendants at that time and we
7 served this e-mail address and this e-mail is, as far as we
8 know, still a good e-mail address. E-mails to it do not bounce
9 back.

10 THE COURT: What is the basis for concluding that this
11 e-mail address is connected to the new defendants?

12 MR. WEIGEL: The new defendants were all part of
13 this -- as alleged in the complaint -- are part of the same
14 scheme to sell fake Gucci purses through the internet. These
15 folks all collectively I think received almost \$500,000 into
16 their accounts at the Bank of China out of the proceeds of the
17 account that the proceeds, the counterfeit sales were dumped
18 into. So what would happen would be, they would sell a purse
19 on the internet, they would process the credit card sale
20 through an operation called Frontline out of Montana. They
21 would deposit the account in a Chase, the money in a Chase Bank
22 account and then the existing defendants would wire that money
23 to these folks in China.

24 So at this point I think that it would be a fair
25 assumption that these new defendants know that this lawsuit

163FGUCA

1 exists because, first off, they've stopped receiving the money
2 they were getting. Their colleagues who were sending the money
3 certainly were served with the complaint, and --

4 THE COURT: The other defendants you mean?

5 MR. WEIGEL: The other defendants. And, and perhaps
6 this is wishful thinking on my part, but the Bank of China
7 froze their accounts, in which case --

8 THE COURT: Do you know that or you're hoping that
9 that's --

10 MR. WEIGEL: I'm hoping that's in line with your
11 Honor's order, but whether they did or didn't, they certainly
12 stopped receiving funds for the counterfeits through this
13 website.

14 We know that this website address this, e-mail
15 address, this Yahoo address was used by the persons who set up
16 this website and since these people received the proceeds from
17 the sales from the websites, I think it's a fair inference and
18 a means calculated to give them notice to send the amended
19 complaint to these two Yahoo addresses. And we could also
20 follow it up if your Honor thought appropriate with personal
21 service on the existing defendants.

22 THE COURT: And then also you're talking about the
23 newspaper.

24 MR. WEIGEL: And we could publish, too, if your
25 Honor -- the publication is a blunt tool, but it's a

163FGUCA

1 well-accepted tool.

2 THE COURT: And when there's nothing else you can do,
3 that's sometimes the best can you do. That's really the
4 inquiry, what's the best you can do that's reasonably designed
5 to give notice to the parties, to the defendant.

6 MR. WEIGEL: And I believe that Mr. Saperstein does
7 not have any objection to any of that.

8 THE COURT: You don't have a dog in that fight, is
9 that right?

10 MR. SAPERSTEIN: That's right, your Honor. I only
11 want to make sure that my client is not put in a position where
12 it has to violate Chinese law. So if it doesn't involve Bank
13 of China, then, no, I don't have a dog in that fight.

14 THE COURT: Let's play that out. Mr. Weigel is deemed
15 to have served these other defendants, these other defendants
16 don't respond, don't show up, default judgment. What's next,
17 then?

18 MR. WEIGEL: Well, then what would happen, we would
19 move for -- and we may have to do it by a separate proceeding
20 or we'd move in this proceeding for a turnover order to the
21 Bank of China requiring them to turn over the proceeds of that
22 account to -- the various accounts to us. So we're not going
23 to avoid our fight completely, but we're just going to avoid
24 our fight as to this service issue.

25 THE COURT: That was an avoidable fight and that was

163FGUCA

1 one of my questions to you. Not based on the e-mail address,
2 but just on the first two methods of service, that would be one
3 way to avoid it. I think it would be kind of a big deal,
4 certainly new ground I think being broken to allow service the
5 way you propose with respect to Bank of China. I'm not saying
6 that's a reason not to do it, but the others would be less
7 controversial.

8 So what does that mean for the other motion you've got
9 kicking, which is the motion to compel Bank of China to confirm
10 that they've been complying with the injunction and to produce
11 the documents ordered by the injunction?

12 MR. WEIGEL: That still stands, your Honor.

13 THE COURT: So we fight that today or we fight that
14 another day after you get your turnover order?

15 MR. WEIGEL: I'm happy to fight that today, your
16 Honor. I'd like to get that resolved, because we'd like to get
17 the documents so that we could pursue these folks, because they
18 may have other bank accounts.

19 THE COURT: So that's what I mean. So we're not
20 avoiding that fight today.

21 MR. WEIGEL: Not at all, your Honor, just the service
22 one.

23 THE COURT: I was going to do service second, but we
24 can do it first. Doesn't sound like we need to fight about
25 that. The only thing I think I need is a tighter understanding

163FGUCA

1 with respect to the e-mail address and to why it's reasonable
2 to conclude that that e-mail address is going to lead to or
3 result in notice to the defendants. Have you written that out
4 someplace?

5 MR. WEIGEL: I'm not sure I have, your Honor. I could
6 certainly speak to it.

7 THE COURT: Does that sound familiar to you? No. I
8 was wondering if just a short affidavit would allow me to pass
9 on it in a more thorough way than we have?

10 MR. WEIGEL: Certainly. We'll submit that first thing
11 next week, your Honor.

12 THE COURT: That's fine. I'm inclined to grant the
13 motion for alternate means of service? What are you going to
14 do otherwise. It seems to me there's just no remedy
15 whatsoever.

16 MR. SAPERSTEIN: Your Honor, I just want to be clear
17 that your granting of the motion is with respect to points one
18 and two.

19 THE COURT: One and two, and now four.

20 MR. SAPERSTEIN: Okay.

21 THE COURT: I'm going to punt on three. I could
22 resolve three if I need to, but I think until I've heard some
23 more argument, that would be an uphill climb for Mr. Weigel,
24 and maybe we want to avoid that one for now.

25 MR. WEIGEL: Thank you, your Honor.

163FGUCA

1 THE COURT: Let's now go back to the motions that I
2 was going to talk to first, the motion relating to confirming
3 proof of freezing the assets and the production of documents
4 and Bank of China's cross motion to modify the preliminary
5 injunction to relieve them of those obligations.

6 There's a lot of talk about the May New York case,
7 Judge Solomon's case, Samsung Logics, right.

8 MR. WEIGEL: Yes, your Honor.

9 THE COURT: I've seen a lot of you guys writing about
10 it back and forth. So your letter, which was June 1 --

11 MR. WEIGEL: Yes, and a letter just today from
12 Mr. Saperstein.

13 THE COURT: Yes, I have it. You distinguish this case
14 because you're saying that case involved a Korean judgment
15 creditor seeking to enforce a British judgment, this is a
16 Chinese judgment debtor and a Chinese bank where there is no
17 New York connection, which may be true. But does that matter
18 for purposes of what's going on here? New York has probably a
19 policy of enforcing judgments in arbitrations, and so does it
20 really turn on just how much New York interests are implicated
21 by the arbitration and that's what distinguishes this Judge
22 Solomon case from this case, from the case before me?

23 MR. WEIGEL: Honestly, your Honor, my personal feeling
24 is that Judge Solomon was -- her decision is wrong and it is in
25 conflict with other judgments such as the Commerce Bank

163FGUCA

1 decision.

2 THE COURT: It's not entitled to tremendous weight.
3 That's not slapping at her or her reasoning, necessarily.
4 She's not the Court of Appeals, that's for sure.

5 MR. WEIGEL: But in any event, what she said in that
6 case was that that case went beyond the -- she said that case
7 went beyond what the Bank of Bermuda case said, and our case
8 and the reason we distinguished them the way we did is that our
9 case is actually narrower and more New York focused than what
10 happened in the Koehler v. Bank of Bermuda case.

11 The dissent in the Koehler case complained and it
12 seemed to be what Judge Solomon picked up on, complained that
13 this could mean that New York would be the center of the
14 universe for people trying to collect judgments. And that was
15 rejected by the Court of Appeals.

16 But in our case we're not going nearly so far. In
17 Koehler it was a Maryland judgment against a defendant, neither
18 the plaintiff or defendant had anything to do with New York and
19 the Court of Appeals held because the Bank of Bermuda was here,
20 you could come to New York, domesticate your judgment from
21 Maryland and make Bank of Bermuda bring assets into New York.

22 Judge Solomon said that what the plaintiffs in her
23 case was trying to do was broader than even what the Court of
24 Appeals allowed. In our case what we're trying to do is
25 narrower than what the Court has allowed, because here the

163FGUCA

1 plaintiff is in New York, the defendants are all subject to
2 personal jurisdiction in New York and the Bank of China is
3 here. So there's no question of forum shopping. None of the
4 concerns that were raised in the dissent to the Koehler case
5 apply here.

6 But all that being said, Judge Castel in the Commerce
7 Bank case allowed an Oklahoma judgment to be domesticated in
8 New York, serve upon Commerce Bank, and that that was
9 sufficient to restrain an account in Germany by Commerce Bank.
10 A similar result was reached in a Wachovia case in the Eastern
11 District by -- it was a magistrate judge, his name escapes me
12 right now -- but also held that serving Wachovia in New York
13 was sufficient to restrain an account in Florida.

14 So there really doesn't seem to be much argument that
15 this Court has the power. The Koehler case was quite plain.

16 THE COURT: Does it matter, though? I don't know
17 about Florida, other states and their bank secrecy law, isn't
18 there a concern that China has a different bank secrecy law
19 than the U.S., typically, that puts folks like the Bank of
20 China between a rock and a hard place? Isn't that a legitimate
21 concern?

22 MR. WEIGEL: Well, it is one of the factors that is to
23 be considered, your Honor.

24 THE COURT: But it wasn't a factor that really was at
25 play in the cases you've just cited, right?

163FGUCA

1 MR. WEIGEL: No, but we're actually arguing, right
2 now, you and I, the case we're going to bring when we get
3 judgment. What we're asking for right now is whether or not
4 this Court has the power to restrain the defendants from
5 accessing these accounts. The answer I don't think anybody can
6 say is in dispute, it's the case, and the First Department in
7 the Abuhamda case restrained a bank account in Jordan. They
8 said we're not doing an attachment here, we're just saying you
9 can't touch it, and they prevented the bank and the defendant
10 from releasing those funds. That was the First Department. It
11 was an injunction, it wasn't an attachment and it wasn't a
12 turnover order. It was prejudgment and the First Department
13 said not a problem and we don't, frankly, understand why the
14 bank had a dog in the fight.

15 THE COURT: But this is a little broader, this
16 injunction, right?

17 MR. WEIGEL: What we're asking for --

18 THE COURT: Freezing the assets is one thing. You're
19 asking for freezing of the assets and the production of
20 documents, some of which might run afoul of China bank secrecy
21 laws, correct?

22 MR. WEIGEL: They claim that that is the case, but we
23 have found, I believe, three different actions, the most recent
24 being in November in front of Judge McKenna who was affirming
25 Magistrate Judge Francis where the Bank of China was actually

163FGUCA

1 ordered to produce documents, and they have yet to produce any
2 evidence that they were in any way adversely impacted by having
3 done that. And if you look at, it's the case of Milliken v.
4 Bank of China. It rejected -- Judge Francis went through the
5 restatement factors and rejected China's argument, held that
6 they --

7 THE COURT: But don't I have to do the same here, or
8 you're saying I don't have to do that?

9 MR. WEIGEL: No, no. I believe your Honor does have
10 to go through the restatement factors here. But you asked
11 about the bank secrecy and I'm saying when you look at the fact
12 that they produced in that case, they produced in a case called
13 Non-Ferrous DM Corp. v. Daniel Karren (ph) in the Southern
14 District where they were ordered to produce documents, and the
15 DOC v. St. Paul Mercury Insurance, a 2004 case, in this court
16 where they were also compelled.

17 THE COURT: Compelled to produce documents?

18 MR. WEIGEL: And interrogatory responses.

19 THE COURT: Pursuant to an injunction or that's a
20 subpoena?

21 MR. WEIGEL: I think it's a subpoena, your Honor. And
22 in all three of those cases they produced documents. They also
23 produced documents in another case brought by Gucci and there's
24 a public filing on the record indicating they are going to
25 produce the documents and they have not produced anything other

163FGUCA

1 than generalized statements that they may possibly be harmed by
2 this. They have done it multiple times and they have not been
3 subject to sanctions.

4 THE COURT: What's the other Gucci case here in
5 Southern District?

6 MR. WEIGEL: My Replica Handbags. And what happened
7 in that case, a very similar case --

8 THE COURT: Who was it before?

9 MR. WEIGEL: It was Judge Koeltl, I believe. What
10 happened -- there's no reported decision in that case. What
11 happened is we got the same sort of injunction your Honor
12 issued here. We served it on Bank of China. They came into
13 Court, said we can't restrain these things, we put them on
14 administrative hold.

15 We then got a judgment. The judgment directed them to
16 turn over the assets. They then said, oh, we released the
17 account several months back. We made a motion for contempt.
18 That was settled. It had a provision in it that was
19 confidential, but allowed for us to disclose it in order to
20 enforce.

21 THE COURT: Are you allowed to disclose it now?

22 MR. WEIGEL: I am because it's on the public record,
23 your Honor. What happened was we then made a second motion to
24 compel because they had not produced the documents that were
25 required to be produced. At the end of the day they filed a

163FGUCA

1 status report on the record saying that they are producing the
2 documents, and the case settled after that.

3 So I'm bringing it up for the point that they've
4 produced documents --

5 THE COURT: But nobody is going to jail in China
6 because of this.

7 MR. WEIGEL: No one has gone so jail. There's no
8 specific instance of anybody having any problem.

9 THE COURT: Maybe it's good to hear from
10 Mr. Saperstein on this, then I'll hear from you again. But
11 since we had a train of thought, you mentioned a bunch of cases
12 and have asserted that the bank secrecy laws in China are
13 really more of a red herring, certainly not something they can
14 specifically support the relief that's being sought by Bank of
15 China. It may be significant for you to respond to it,
16 Mr. Saperstein.

17 MR. SAPERSTEIN: Yes, your Honor. I'm happy to
18 respond to it, then perhaps I can touch upon the separate
19 entity issue as well.

20 Your Honor, Bank of China alleges that the bank
21 secrecy laws are a paper tiger.

22 THE COURT: I think that's exactly what you said. You
23 allege. Somebody used it in the letter.

24 MR. SAPERSTEIN: I used that, your Honor, because
25 that's essentially what they're saying. We have submitted two

163FGUCA

1 expert affidavits by Professor Wu, as well as Professor
2 Feinerman confirming that, one, Bank of China does have those
3 bank secrecy laws and plaintiff does not contest otherwise, and
4 second of all, there are examples and instances of banks,
5 including Bank of China, being subject to liability for
6 violating or allegedly violating those regulations.

7 THE COURT: What about the ones that have been
8 mentioned now by Mr. Weigel?

9 MR. SAPERSTEIN: Turning to the Milliken case. I
10 think if anything the Milliken case is helpful to us. If I
11 may, I'll give you a brief bit of background on the Milliken
12 case. That, the Milliken served a turnover position -- by way
13 of background. Milliken had a copyright infringement action
14 against certain defendants. They brought an action in China
15 and obtained preliminary relief in China against the alleged
16 infringer. Then they got a -- they brought a second suit in
17 Nevada and obtained a default judgment there. Then they
18 brought an action for enforcement in Florida and were actively
19 litigating that matter against the judgment debtors.

20 Then Milliken brought another action three weeks after
21 Koehler in New York and served a turnover petition on the Bank
22 of China. The Bank of China in that action filed an answer
23 asserting an affirmative defense. Plaintiff said produce the
24 documents, and initially the bank said they refused. Then the
25 Court said if you're going to rely on the affirmative defense

163FGUCA

1 you need to produce the documents.

2 That's not what we have here. In fact, in the
3 decision that Magistrate Judge Francis issued, he says, which
4 is I think perfectly on point here, "it's one thing to require
5 a party bringing a claim to resort to the Hague evidence
6 convention procedures in order to obtain evidence from another
7 entity necessary to support that claim."

8 The Court goes on to say, "It's a different matter to
9 submit a party to decline to disclose information when they're
10 trying to rely on that for an affirmative defense."

11 So Magistrate Judge France opinion there specifically
12 says that when you're a non-party that is not asserting a
13 claim, as the Bank of China is here, that it is perfectly
14 reasonable to make the claimant resort to the Hague evidence
15 convention.

16 Second of all, with respect to the documents, after
17 the motion was decided, the Bank of China made documents
18 available, but they had customer consent and a very different
19 issue is that the judgment debtor was present and actively
20 litigating with the plaintiff Milliken. They litigated in
21 China, they were actively litigating in Florida, and so there
22 the judgment debtors were present. Very different from here.
23 So the judgment debtors were present and the bank got consent
24 from the customer to release the documents.

25 That's not -- we don't have that here, your Honor. We

163FGUCA

1 don't have customer consent to release the documents.

2 Ultimately in Milliken what happened was, the petitioner,
3 Milliken, settled the action with the judgment debtors, so that
4 case was dismissed, the turnover petition against the bank was
5 dismissed ultimately because Milliken and the judgment debtor
6 had settled.

7 We don't have that here, your Honor. We don't have
8 the alleged customers of the bank present and available to give
9 consent to release documents.

10 THE COURT: But, I mean, that's true, I don't think
11 there's any dispute about that, but isn't it kind of perverse
12 that the folks who don't show up at all for whom there is
13 jurisdiction and a judgment has been entered against them, get
14 to, sort of get the benefit of all the bank secrecy laws and
15 all the protections that you're talking about? Leaving the
16 plaintiff here basically without a wagon, right? What are they
17 supposed to do?

18 MR. SAPERSTEIN: Your Honor, I think there's a
19 solution.

20 THE COURT: Tell me the solution.

21 MR. SAPERSTEIN: The solution here is that plaintiffs
22 can submit -- should go through the Hague evidence convention.
23 I have offered --

24 THE COURT: Does that ever work?

25 MR. SAPERSTEIN: Your Honor, we have submitted

163FGUCA

1 evidence in two letters. One on May 19 and one earlier today,
2 in which the Ministry of Justice confirms that they have and
3 will on a Hague Convention request for evidence located in
4 China. Now, Mr. Weigel said when we were before you on
5 January 25 that going through the Hague Convention, Judge, is
6 futile. Right?

7 THE COURT: Right.

8 MR. SAPERSTEIN: In the most recent submission on
9 June 1, you'll note that the tenor has changed. It is no
10 longer futile, it's, well, it takes a long time.

11 THE COURT: Taking a long time would not be futile if
12 in fact it turns out that Bank of China has frozen the assets,
13 right? But if they haven't, futility seems assured. And I
14 have to guess whether or not you've frozen the assets?

15 MR. SAPERSTEIN: Your Honor, look, I mean, I don't
16 think the Bank of China has been perfectly clear here on what
17 the law is in China. The law in China prohibits the freeing of
18 a customer's assets based on foreign process. We've said that
19 to the Court many times and we submitted expert affidavits to
20 that effect. That's what I can tell the Court. But this is
21 about documents, and the question is, the question is, how do
22 they get the documents they purportedly need?

23 THE COURT: Well, it's about documents and it's about
24 other things. So maybe we should focus on the things where
25 maybe we can get someplace, because I don't think you're going

163FGUCA

1 to budge on documents. What about confirming that the assets
2 have been seized? Is that something the Bank of China can do?

3 MR. SAPERSTEIN: If I could stick on documents for one
4 second? I just want to close the loop here, if I can.

5 We are prepared to work with plaintiffs. One, I
6 offered to draft the Hague evidence convention request for them
7 for their review and we have offered to work with them to file
8 it with your Honor and submit, if we could do so, a letter or
9 affidavit, or some submission to the Chinese authorities saying
10 we've agreed with this request.

11 THE COURT: That might be a reasonable thing to do if
12 you know at the end of the day there are assets you're going to
13 get. There still might be problems with it, but I guess why
14 not, what is restraining the Bank of China from confirming that
15 they have seized the assets or they have at least complied with
16 the preliminary injunction as far as the assets are concerned?

17 MR. SAPERSTEIN: Your Honor, again, all I can say --
18 what I can say is I know the Bank of China has informed the
19 Court of the restrictions that apply under Chinese law.

20 THE COURT: All right. What you're suggesting is that
21 you'll help write the Hague Convention requests, you'll be
22 there side by side with Mr. Weigel and then at the end of the
23 day maybe there will be some assets there and maybe there won't
24 be, and if they aren't, then we'll know it was futile and two
25 years from now we'll know what to do next time?

163FGUCA

1 MR. SAPERSTEIN: Your Honor --

2 THE COURT: I don't know. I'm being a little
3 facetious, but this makes sense only if you're prepared to wink
4 and nod in such a way to make it clear there's an advantage to
5 doing it this way. Otherwise, I don't blame Mr. Weigel for
6 saying we need to do better than this.

7 MR. SAPERSTEIN: Your Honor, presumably we would
8 encounter the same issue whether you order documents to go
9 through the Hague Convention or order the bank to release
10 documents in response to a Rule 45 subpoena.

11 THE COURT: I think Mr. Weigel has two main goals
12 here. One is to make sure at the end of the day he gets
13 assets. The other is to give him access to information that
14 would allow him to pursue a trail while it's hot. Hot at this
15 point being relative. At this point it's a pretty cold corpse,
16 I imagine. So I'm not sure what you propose satisfies the
17 second objective, but it might make sense for the first if the
18 Bank of China has frozen assets, but you're not in a position
19 to let us know whether that's true, so we just have to hope and
20 cross our fingers.

21 MR. SAPERSTEIN: I think there are two responses to
22 that, your Honor. First of all, the trail is, to use your
23 term, perhaps cold because we have been fighting with them
24 since July.

25 THE COURT: I think Mr. Weigel wants to win this one

163FGUCA

1 now so the next time he has a warm body.

2 MR. SAPERSTEIN: I would say, your Honor, maybe the
3 thing to do, we've offered this many times to Mr. Weigel, it's
4 unclear to me why he won't go on parallel tracks; one, go
5 through the Hague Convention and pursue his motion. I have
6 offered to go on parallel tracks and Mr. Weigel has not been
7 inclined to do that. I'm unclear why. I suspect, your Honor,
8 Mr. Weigel doesn't want the Hague Convention process to be
9 successful because that would mean he would have to go through
10 it. It's particularly unfair, given the fact the bank is put
11 in a very unfair position where it has bank secrecy laws to
12 comply with. At one point Mr. Weigel said I don't see why Bank
13 of China is raising an issue here. The Bank of China is
14 raising an issue here because it's caught in a difficult
15 position.

16 THE COURT: I understand the difficult position of
17 Bank of China. I think it's unclear as to how difficult a
18 position, whether it's really between a rock and a hard place
19 or it's as Mr. Weigel suggests, nobody is going to jail for
20 this. I understand your expert's report and I understand what
21 you're saying on this. Everyone would have to understand it's
22 a difficult position for anyone to be in, that they have to
23 comply with a Court order in New York or run the risk of
24 violating a law in China. Nobody wants to be in that
25 situation. And ideally you're right, this is what conventions

163FGUCA

1 and governments are for. They are designed to sort of deal
2 with these problems, because ultimately they're international
3 problems involving governments.

4 But the law is such that Courts actually get to make
5 decisions on this kind of thing, so I don't have to wait for
6 the State Department to negotiate the next deal. I can by
7 applying the framework that's been handed to me by the Court of
8 Appeals actually give Mr. Weigel what he wants, right? Even if
9 it looks like you're going to be caught between a rock and a
10 hard place. The issue is how hard is that hard place.

11 MR. SAPERSTEIN: Your Honor, you're right, and I would
12 posit and support my evidence from the experts that it's a hard
13 place indeed.

14 The second reason why, you mentioned the futility
15 argument with respect to the documents. You mentioned
16 Mr. Weigel is interested in following the money, I believe.

17 THE COURT: I think he is. I assume that's what
18 motivates him. He looks like a materialistic person. He
19 dresses better than I do, let's put it that way. So do you,
20 Mr. Saperstein.

21 MR. SAPERSTEIN: You're very kind, your Honor, thank
22 you. That made my day.

23 THE COURT: The bar is pretty low here.

24 MR. SAPERSTEIN: I will still take it.

25 I think the documents will be useful also for

163FGUCA

1 following the money. If, for example, Mr. Weigel wants to
2 follow the money from, let's say it went from Bank of China,
3 assuming it did, to somewhere else, the documents could show
4 that. If that's what he's interested in, following the money,
5 the documents could show that, and if he wants to go to the
6 person who ultimately has the money or ultimately is
7 responsible for the purported infringing the documents could
8 help him do that in terms of a trail. So I'm not sure seeking
9 documents would be futile.

10 Now, I certainly do think that if we had done this a
11 while ago, gone through the Hague Convention, even at the same
12 time we pursued the motion, we would be a lot further along
13 than we are now.

14 THE COURT: No question about that. Mr. Weigel you
15 have a handle on this, though maybe the facts have changed
16 since you started. Maybe China is warming up to these reviews
17 since it started to deal with this problem. The State
18 Department seems to thinks so.

19 MR. WEIGEL: The State Department took it out. The
20 State Department has many issues with China and they didn't
21 give a clue, didn't say anything to suggest that the situation
22 had improved, they simply took it out. We attached to one of
23 our letters an ADA study which said that the Peking court,
24 which processes approximately 1 per year, and even under their
25 analysis they say that 50 percent of them get declined over the

163FGUCA

1 course of six to twelve months.

2 So it really is not -- it is true, your Honor, that
3 when your Honor ordered that they produce the documents in ten
4 days that I didn't think almost a year later they wouldn't have
5 produced the documents. But the Second Circuit has set forth a
6 number of criteria as to when you can judge how important the
7 government's interest is, and one of them is when it depends on
8 the consent of the depositor, then that's not a very strong
9 government interest because it's not a situation where, like
10 Switzerland, where you can't release the information under any
11 basis. The Second Circuit has said that when the depositor or
12 when the customer can waive the privilege, it's not a very
13 strong concern of in this case the Chinese.

14 Second, the Chinese government has not come in here
15 and submitted anything.

16 THE COURT: Hold on. You're arguing the merits of the
17 motion, and I understand that. But I don't think you're
18 responding to Mr. Saperstein's point, which is why not give the
19 Hague Convention a try? And I think what you're saying is that
20 nothing really has changed since January, right?

21 MR. WEIGEL: Nothing has really changed since January.
22 It's an added expense. This is an action that was brought in
23 New York for sales in New York. The Bank of China, while
24 between a rock and a hard place, has put themselves in that
25 place and in fact, and Mr. Saperstein and I go around and we do

163FGUCA

1 this on Monday we're in Judge Pitman's courtroom doing the same
2 thing because they are the recipient of the proceeds of a very
3 large amount of the counterfeits that are sold here and the
4 only way that the counterfeiter's model works where they kind
5 of hide behind the fog in China is if they have a conduit to
6 get the money, U.S. dollars.

7 THE COURT: I get all that. The other concern, and
8 this is what governments exist for, is to weigh what are the
9 costs of Bank of China just then getting out of New York,
10 because that could have a detrimental effect on other players
11 in a big economy, right? So I understand what you're saying.
12 I think there's a lot to what you say there. It's frustrating.

13 MR. WEIGEL: U.S. banks produce Lord knows how many of
14 these Chase deals in a given week and why should the Bank of
15 China have some sort of competitive advantage that
16 counterfeiters can use their bank and shield their assets,
17 whereas if they had people doing banking with Chase, Chase
18 would turn it over?

19 THE COURT: I think the reason is because China is a
20 sovereign country and China gets to enact its own laws with
21 respect to what's required of its banks in China. This is not
22 a new problem. This is kicking around for a while. Congress
23 could fix it if they wanted to, right, by just saying we're not
24 going to allow this to happen, we recognize China is a safe
25 haven for fraudsters on a massive scale and we're not going to

163FGUCA

1 stand for their bank secrecy laws during which fraudsters
2 operate.

3 MR. WEIGEL: The Second Circuit already decided this,
4 your Honor, in 1959 I think again in another First National
5 City case where again they said if a bank has problems
6 complying with two different sovereigns, that's the bank's
7 choice in having chosen to operate in two different companies
8 under two different sovereigns, and if they can't do both, then
9 they have to surrender to one or the other.

10 THE COURT: We have a convention, right? There is a
11 convention that is recognized, that the U.S. is on board with,
12 that this is acceptable. This is an acceptable way for
13 multinational entities or entities with offices in different
14 countries to be able to function. That's their general running
15 rule.

16 MR. WEIGEL: There is clearly a convention and the
17 Supreme Court has said, I think it's the Aerospatiale case,
18 that it's not mandatory and in this circumstance where there's
19 only a 50 percent chance that in six to twelve months we might
20 gain information --

21 THE COURT: Do you think it's that high?

22 MR. WEIGEL: No, I don't. But that's what their
23 statistics say. That's what they say as it's gotten better.
24 Now you have half of a 50 percent chance that in six to twelve
25 months we might get something, that this is just not an

163FGUCA

1 effective remedy here.

2 THE COURT: Look, I understand your arguments. I've
3 been sympathetic to them and I don't think, I mean, this is
4 lost on me. I wanted to give Mr. Saperstein an opportunity to
5 respond to you on some of the other cases that you mentioned.
6 So he's responded with respect to two; Judge Francis' decision
7 and the one Judge McKenna adopted. What about the Judge Castel
8 case?

9 MR. SAPERSTEIN: Your Honor, that goes to the separate
10 entity. I wanted to finish up with the documents. Your Honor
11 said things have changed since January, the answer is yes. We
12 now have more information than we did in January. First is the
13 State Department website on which the plaintiffs relied very
14 heavily on in their papers has been revised. Previously the
15 State Department said it was very uncertain, difficult and
16 unlikely to go to the Hague Convention. That language was
17 specifically struck from the web site.

18 THE COURT: Any idea why? You say it supports an
19 inference that it no longer is dire or discouraging as it once
20 was. Conceivably it could be that the portion of the language
21 that said while it is possible to request compulsion, was
22 deemed to be overstating, because it's barely probable now. So
23 I don't know, is there something else on the website or in
24 State Department literature that suggests that things really
25 are getting better?

163FGUCA

1 MR. SAPERSTEIN: There's the evidence that we have for
2 the Chinese Ministry of Justice, but in answer to your question
3 do I know why they revised it, I called the State Department to
4 find out to speak to them about this. They told me when I
5 asked them if I could quote them in an affidavit and they said
6 I couldn't unless I did it by way of Touhy requests.

7 THE COURT: Got it. That's even slower than Hague
8 Convention.

9 MR. SAPERSTEIN: I feared I would not have it in time
10 for the hearing, your Honor. What I was told -- and if the
11 Court wants me to submit Touhy requests to the State Department
12 so they could put their opinions in writing -- I was told it
13 was outdated. That's the specific term I was told. I was told
14 that the State Department encourages people to go through the
15 Hague Convention. That's what I was told.

16 As to evidence, your Honor, we have two pieces of
17 evidence. And it's not, as Mr. Weigel says, my evidence, it is
18 from Ministry of Justice.

19 THE COURT: The ILCC thing.

20 MR. SAPERSTEIN: Right, which channels Hague
21 Convention requests. There are two pieces of information.
22 They have informed us that on average they have honored
23 50 percent of the requests for documents.

24 THE COURT: Mr. Weigel was alluding to that a moment
25 ago.

163FGUCA

1 MR. SAPERSTEIN: And it's executed within a
2 six-to-twelve-month period. Now, I don't know about what
3 50 percent, the ones that were not honored or may still be
4 pending, I don't know if they were overly broad, I don't know
5 what those were, but certainly 50 percent is not futile.

6 Second of all, we would be prepared to work with
7 Mr. Weigel to assure that a Convention request, we would do our
8 best to make sure that it is honored, and third of all, your
9 Honor, the numbers are pretty consistent with other countries.
10 And that's what we submitted by way in our letter today. Now,
11 Mr. Weigel may say he doesn't like the Hague Convention as a
12 matter of policy. Okay, but it is a treaty that's in place and
13 parties do go through it and courts have required parties to go
14 through it. For example, we appended as Exhibit D to our
15 letter of today that there's a summary of Hague Convention
16 requests by responding countries and the average time for
17 executing a letter request is about six months. Of the 936
18 letters of request reported by responding nations to be served
19 in 2007, 216 were executed in the six-to-twelve-month period,
20 which is the single largest amount for any time period. Not
21 the most artful sentence, but certainly that was the most for
22 any given time period.

23 So China is right in the thick of it. China is not a
24 rogue country here. It's not an outlier. It's in the thick of
25 it in terms of honoring a Hague Convention request. I give the

163FGUCA

1 numbers for the UK --

2 THE COURT: This is all in Exhibit D?

3 MR. SAPERSTEIN: Yes, your Honor, Exhibit D.

4 THE COURT: As I said, I skimmed this. I looked at
5 the letter, I didn't look at the attachment.

6 MR. SAPERSTEIN: It's a mere 54 pages to the
7 attachment, your Honor. I figured I should give you the whole
8 document rather than the table.

9 THE COURT: Fine. I'm just saying I haven't looked at
10 it. But this is what you're referring to, data in Exhibit D,
11 which is the HCCH report.

12 MR. SAPERSTEIN: Precisely, your Honor. Then I also
13 recite the numbers for the UK. And in 2007 the UK executed 36
14 letters, 15 of which were executed in the six-to-twelve-month
15 period, and so as to the rate of execution, the UK received 123
16 letter requests, 87 of which were returned unexecuted or were
17 still pending as of December.

18 THE COURT: Well, they're a rogue country, too. Isn't
19 that why you're here?

20 MR. SAPERSTEIN: Indeed it is, your Honor.

21 So China -- it's not futile, and China is in the thick
22 of it in terms of honoring Hague Convention requests and we
23 will certainly work with the plaintiffs to submit a Hague
24 Convention request, your Honor.

25 THE COURT: But just so we're all clear, this is a

163FGUCA

1 Hague -- what we're really talking about here and I think what
2 Exhibit D refers to is requests for documents, right?

3 MR. SAPERSTEIN: Yes, your Honor.

4 THE COURT: You keep resisting -- I think I understand
5 why. You keep resisting a request for documents. You keep
6 making a distinction between a request for documents and -- let
7 me rephrase. You're making no distinction between a request
8 for documents and a request for some sort of confirmation of
9 compliance with the preliminary injunction as it applies to the
10 seizing of the assets. Right now Mr. Weigel doesn't know
11 whether the assets have been seized and you're suggesting you
12 can't consistent with bank secrecy laws in China confirm or
13 deny that, correct?

14 MR. SAPERSTEIN: The law is as we stated in our expert
15 declarations, your Honor, and that is what I'm able to say.

16 THE COURT: Okay.

17 MR. SAPERSTEIN: Your Honor, turning to the cases that
18 Mr. Weigel cited, he cited some in the separate entity context
19 and some in the document context and I'll just finish off in
20 the document context, if I may. Mr. Weigel cited the Milliken
21 case, we discussed that. He also mentioned the prior Gucci
22 case.

23 THE COURT: Yes, the one before Judge Koeltl.

24 MR. SAPERSTEIN: Yes, versus MyReplicaBag.com.

25 Perhaps the case is illustrative for why plaintiffs are here

163FGUCA

1 again. The upshot of that case was Bank of China ended up
2 settling that case for \$500,000, which went to Mr. Weigel's
3 firm and to him.

4 Now, what happened there was defendant had appeared in
5 that litigation. Defendant has entered into and approved a
6 temporary restraining order. Part of that temporary
7 restraining order was consent to produce documents. So Bank of
8 China had a defendant who had appeared and had consented to the
9 release of his documents. We don't have that here.

10 Now, there is -- there was some issue of was the
11 consent sufficient for purposes of Bank of China. I agree with
12 that. There was to and fro. What ultimately happened in that
13 case was the documents were made available at counsel's office,
14 and one of Mr. Weigel's colleagues came over and got to look at
15 them. When Mr. Weigel started to press for more, the bank
16 ultimately sent them. The bank had customer consent to send
17 the documents, but when Mr. Weigel started increasing his
18 pressure and increasing his demands, the bank ultimately
19 settled for \$500,000. Maybe that's why Mr. Weigel is here
20 again, I don't know.

21 But to say there's no harm to the bank when they paid
22 \$500,000 to Mr. Weigel, I think is not true. So I think if
23 anything, if anything, the Gucci case shows that the bank is in
24 potential jeopardy here.

25 THE COURT: It's not clear to me why them paying

163FGUCA

1 \$500,000, and I don't know whose money it was, theirs or their
2 account holders, but that doesn't speak to whether or not they
3 got in trouble in China for doing this.

4 MR. SAPERSTEIN: They had customer consent, your
5 Honor.

6 THE COURT: So they didn't get in trouble in China.

7 MR. SAPERSTEIN: I don't know the answer to that
8 question. I do not know the answer to that question.

9 THE COURT: I think all these cases are factually
10 distinguishable and ultimately these determinations turn on the
11 facts. I get that. But it does seem as though there certainly
12 are enough instances in which the Bank of China is dealing and
13 is producing documents to suggest that people aren't routinely
14 going to jail when documents are getting produced. Are you
15 suggesting that the only time the Bank of China has produced
16 documents in analogous cases is where there has been customer
17 consent?

18 MR. SAPERSTEIN: Those are the only two examples I'm
19 aware of, your Honor.

20 THE COURT: All right.

21 MR. SAPERSTEIN: And then in those two instances the
22 bank had customer consent. But it's an invidious position to
23 put the bank in, to say you know, you should produce documents
24 even though you don't have customer consent and you should hand
25 those documents over and you run the risk of the penalties, and

163FGUCA

1 the bank's position is, as we said, your Honor, patently
2 unfair.

3 Now, if I may turn to the separate entity argument,
4 because Mr. Weigel cited I believe one case which was the JW
5 Oilfield case that was decided by Judge Castel earlier this
6 year. And that case is distinctive because there the parties,
7 the bank, didn't raise and did not brief the separate entity
8 rule. It wasn't an issue. It wasn't an argument that the bank
9 was making.

10 Second of all, I would say that JW Oilfield is in a
11 minority of the cases with respect to the separate entity rule.
12 I'll go through the cases that I think are the rule in a
13 second. And third of all, even in JW Oilfield, even though the
14 bank didn't raise the separate entity rule, and even though I
15 think to the extent you could read it more broadly, the Court
16 there said in the prejudgment context the separate entity rule
17 is alive and well. And so even if you accept that case as
18 binding on this Court, that it had been fully litigated, in the
19 prejudgment context the Court acknowledged that the separate
20 entity rule is still valid, something arguably so. But I think
21 the rule is in this district that in the prejudgment and
22 post-judgment context the separate entity rule is still good
23 law.

24 Now, the Samsung decision I think is relevant to that,
25 your Honor. Then, the Court said quite clearly that Koehler

163FGUCA

1 did not abrogate the separate entity rule for post-judgment
2 enforcement. Now, Mr. Weigel says, well, the facts are
3 different, the debtor wasn't present, there were less contacts
4 with New York. That for purposes of the separate entity rule,
5 that analysis is irrelevant. The Court specifically held there
6 that the separate entity rule still applies. In fact, in
7 Samsung, the petitioner there raised the same exact argument
8 plaintiffs are raising here, that the bank is present in New
9 York through its branch there and you could compel the branch
10 to produce assets on a worldwide basis. The Court in Samsung
11 rejected that argument and held that under the separate entity
12 rule the branches of the bank are separate and the question is
13 does the entity that is before the Court have the property, yes
14 or no, or do they have control over the property and the Court
15 held that the Bank of China, New York branch, did not have the
16 property there and did not have control over the property
17 located abroad.

18 THE COURT: Can I interrupt? So is your analysis sort
19 of saying that the conclusion here would be different where
20 it's being sought in connection with a preliminary injunction
21 as opposed to in conjunction with a turnover order?

22 MR. SAPERSTEIN: No, your Honor. I think it's equally
23 strong whether it's a preliminary injunction or post-judgment
24 enforcement action. The separate entity rule is good law.

25 And, your Honor, there are a number of cases in which

163FGUCA

1 courts in this district have affirmed the vitality of the
2 separate entity rule. For example -- and we cite a number of
3 these in our brief -- the Motorola case, which was a
4 post-judgment case, held that you cannot force a branch to
5 bring in property, a branch of a bank to bring separate assets
6 in located abroad. Fidelity Partners is another case,
7 Mr. Weigel argues that, he's probably familiar with that.

8 THE COURT: The point Mr. Weigel makes is the
9 rationale for Koehler and the rationale for the separate entity
10 doctrine doesn't apply here, the parade of horrors that drove
11 the Court in that case doesn't really exist here because you've
12 got the individual defendants who came into New York and did
13 business, so there is jurisdiction over them vis-a-vis a
14 judgment against them. So the concern that New York then is
15 going to become just the location of battles like this where
16 there's really no New York interest is not applicable here.

17 MR. SAPERSTEIN: I certainly think there are some real
18 policy concerns there, your Honor, and for a bank here to be
19 required to turn over property abroad will have some
20 precedential value and profound policy implications. Indeed,
21 the Federal Reserve Bank of New York branch, New York has
22 submitted a brief in the Samsung litigation. The clearing
23 house has submitted briefs.

24 THE COURT: Wait, a brief in connection with the
25 decision that was rendered by Judge Solomon or an appeal of

163FGUCA

1 that?

2 MR. SAPERSTEIN: In the underlying case with Judge
3 Solomon.

4 But, your Honor, whether the debtors are present or
5 not in New York is irrelevant for the separate entity property.
6 It doesn't make a difference. I can make other arguments
7 whether the debtor is in New York or not, but for purposes of
8 the separate entity doctrine doesn't matter if the debtor is
9 here or elsewhere. The separate entity doctrine says if you
10 have a branch of a bank in the U.S. it is deemed to be a
11 separate entity from branches elsewhere except in certain
12 exceptions which don't apply here.

13 So we can talk about whether the debtors are here, but
14 that's not relevant to the separate entity analysis. And there
15 are a number of Courts that have held that in the prejudgment
16 context and in the post-judgment context that you cannot force
17 a bank to restrain and then turn over assets located abroad.

18 Indeed, just recently, Judge, I believe Patterson,
19 issued the Levin decision, which was decided in January 2011
20 specifically reaffirming the validity of the separate entity.
21 Judge Griesa in one of the Aurelius cases last year affirmed
22 the vitality of the separate entity doctrine. We also cite the
23 Lotus case in our briefs that confirm the vitality of the
24 separate entity doctrine. The John Wiley case that we cite in
25 our brief confirms that New York recognizes the separate entity

163FGUCA

1 doctrine.

2 Koehler did not address the separate entity doctrine.
3 It wasn't before the Court. The Court didn't speak to it. The
4 Court did not specifically say the separate entity doctrine is
5 bad law. The separate entity doctrine has been New York case
6 law since I believe 1950 and it would be up to the Court of
7 Appeals to overturn a well-established doctrine of New York law
8 by silence and so the Court of Appeals simply did not consider,
9 simply did not consider and certainly didn't rule upon the
10 separate entity rule.

11 THE COURT: Is there any attempt that you're aware of,
12 could you get the Court of Appeals to weigh in on this either
13 by referral by way of the Second Circuit or through the normal
14 appeals process within the state?

15 MR. SAPERSTEIN: What I can tell you, your Honor, is
16 that certainly there are bank organizations including the IIB,
17 as well as the clearing house, that is very actively submitting
18 amicus briefs in this area. I can tell you right now my
19 practice is busy with Koehler-related cases and we have,
20 frankly, in my view another winter storm on our hands where we
21 have a parade of Koehlerrelated litigation. I think, yes, at
22 some point it's either going to go up to the circuit or the
23 Court of Appeals.

24 THE COURT: But nothing now teed up for the circuit?

25 MR. SAPERSTEIN: Interestingly the plaintiffs cite the

163FGUCA

1 Eitzen case. It was before the Second Circuit and plaintiffs
2 cite it as an example of a Court, I believe it's Judge
3 Hellerstein's decision, where the Court said the separate
4 entity decision was overturned by Koehler. That decision was
5 vacated just a couple of weeks ago by the U.S. Court of Appeals
6 because the case had been rendered moot. So the Eitzen case is
7 no longer good law, certainly has no precedential value and
8 that case is not before the Second Circuit any more.

9 THE COURT: Mr. Weigel, do you want to respond on that
10 point?

11 MR. WEIGEL: Yes. First off, your Honor, in this age
12 of computers, we apologize because we missed the fact that the
13 case was vacated. It was two weeks ago, I believe. It was an
14 unreported decision and the Second Circuit's decision didn't
15 somehow come up on Lexis or Nexis.

16 Why it was vacated is interesting. Judge Hellerstein
17 ordered the Bank of India to comply with a restraining order
18 and subpoena served upon it. The Bank of India objected below,
19 fought through the whole process and then in its opening brief
20 to the Second Circuit announced that it had searched all of its
21 worldwide records and come to the conclusion that the debtor in
22 that case did not have an account with them and so it was the
23 plaintiff who had prevailed below who moved to have an appeal
24 dismissed on grounds of mootness and it was dismissed.

25 THE COURT: The main point that I was asking about was

163FGUCA

1 whether this is poised to be decided by the Second Circuit or
2 whether the Second Circuit is in a position to make a referral
3 to the New York State Court of Appeals.

4 MR. WEIGEL: Well, they did, your Honor, and that's
5 the Koehler case. My colleague says that it was not decided,
6 but in fact the very same banks submitted in the Koehler case
7 arguments that Koehler should not come out the way it came out
8 because of the separate entity doctrine. They argued that the
9 separate entity doctrine prevented the Court in New York from
10 ordering the Bank of Bermuda in Bermuda to produce a stock
11 certificate. There was a strong dissent in Koehler, but the
12 majority and the decision that's binding on all of us, held
13 that in fact when there is jurisdiction over the bank in New
14 York despite the separate entity doctrine, which was not
15 mentioned at all --

16 THE COURT: It's not mentioned at all.

17 MR. WEIGEL: There's no indication that they thought
18 that it was in any way an impediment to ordering, and it's not
19 a doctrine out of the Court of Appeals, but there is no
20 statement in Koehler that suggests that this Court should
21 somehow consider the separate entity doctrine in deciding
22 whether you can force a bank abroad to bring assets into the
23 United States and -- it's an interesting thing, because the
24 Bank of China has never come in here and said that it is not
25 subject to this Court's personal jurisdiction, like the Bank of

163FGUCA

1 Bermuda was subject to this Court's personal jurisdiction in
2 that case. Whether you treat the New York branch as separate
3 or not, I suppose we can go into some big inquiry, some
4 metaphysical discussion --

5 THE COURT: That's why I don't think this question
6 will be resolved by Koehler. I disagree with you. I think
7 there's got to be a way to tee it up for the Second Circuit to
8 say once and for all what it is to do in cases like this one,
9 but I don't think the circuit is poised to do it any time soon.

10 MR. WEIGEL: If I could make a suggestion, your Honor.
11 The question of whether this Court has the right to issue the
12 injunction has been decided by the First Department, the
13 Abuhamda case quite plainly says this Court could enjoin, in
14 that case it was a bank in Jordan that had an office in New
15 York, from allowing the assets to be dissipated. The U.S.
16 Supreme Court in First National City Bank overturned the Second
17 Circuit decision applying the separate entity doctrine. The
18 Second Circuit applied the separate entity doctrine and said
19 the Court in New York couldn't order, it was a branch in -- I
20 want to say Uruguay. I may have the country wrong, but it was
21 in South America. The Second Circuit said this Court could not
22 enjoin Citibank from releasing funds in Uruguay, out of its
23 branch in Uruguay, and the Supreme Court overturned that and
24 said this Court has the power to restrain assets as long as you
25 have power over the bank, which it did.

163FGUCA

1 THE COURT: I get that. That's why I keep going back
2 to whether there's a distinction to be made between restraining
3 the assets and confirming that fact and producing documents,
4 which is a little different. They are both the subject of the
5 preliminary injunction, but they are certainly different
6 injunctions, as it were.

7 MR. WEIGEL: Courts in this circuit, in this courtroom
8 have routinely ordered banks to produce documents from abroad.
9 It's not particularly unusual. They've done it even when
10 parents own subs. The easiest case is when it's the same
11 corporate entity. There's the five-factor test that your Honor
12 knows.

13 THE COURT: Look, I get all that. I'm just, I think
14 we keep going back to the different interests that are at issue
15 here and I think the separate entity doctrine implicates some
16 of those as well, a different set of interests as well.

17 I think I'm going to have to wrap this up. I'm going
18 to reserve on this, but I do want to resolve this quickly.

19 MR. SAPERSTEIN: If I may, just a few points.

20 THE COURT: Very, very quickly, because I have a full
21 house.

22 MR. SAPERSTEIN: Your Honor, a couple of other points.
23 I just want to point out that Koehler is in apposite here.
24 There are several other points. I'll be brief. The first
25 point is Koehler involved a narrow set of facts and in that

163FGUCA

1 case the judgment debtor pledged the securities to the bank as
2 collateral. The bank itself had appeared before the Court.
3 There was no separate entity issue and the bank clearly had
4 control over the assets at the time the restraining notice and
5 petition were served.

6 THE COURT: No, I understand that.

7 MR. SAPERSTEIN: Okay. And the other point is, your
8 Honor, it's perhaps an obvious one, I apologize. Koehler is
9 simply silent and did not address because it did not need to
10 address the conflict of the law issue that we have here. There
11 was no conflict of law issue in Koehler and we have that issue
12 squarely in this case.

13 THE COURT: Okay. I do get it. I appreciate the
14 parties' preparation, it was obvious. It was interesting and I
15 really do enjoy having good lawyers who know their subject as
16 well as you both did and I want to thank those who didn't speak
17 but who obviously had a role in preparing, you and ultimately
18 me for today. So thanks. I will get back to you, I promise,
19 quickly on this.

20 MR. WEIGEL: We will get that affidavit to you.

21 THE COURT: What do you think; by Tuesday?

22 MR. WEIGEL: If Tuesday is acceptable, we'll get it to
23 you by Tuesday.

24 THE COURT: Thank you very much.

25 (Adjourned)